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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

SIDIKIBA GREENWOOD JR.,

Defendant and Appellant.

E055262

(Super.Ct.No. FSB901921)

OPINION

APPEAL from the Superior Court of San Bernardino County. Duke D. Rouse, Judge. (Retired judge of the San Bernardino Super. Ct. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.) Affirmed.

Mark A. Hart, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Julie L. Garland, Senior Assistant Attorney General, Melissa Mandel and Scott C. Taylor, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant Sidikiba Greenwood Jr. shot Hubert Williams three times in the chest during an altercation that involved defendant's mother and a woman that was with Williams. Williams died as a result of the gunshot wounds.

Defendant was convicted of willful, premeditated and deliberate first degree murder (Pen. Code, § 187, subd. (a)).¹ The jury also found true the allegations that he discharged a firearm causing death during the commission of murder (§ 12022.53, subd. (d)); he personally discharged a firearm (§ 12022.53, subd. (c)); and that he personally used a firearm (§ 12022.53, subd. (b)). Defendant was sentenced to 25 years to life for the first degree murder, plus 25 years to life for the section 12022.53, subdivision (d) enhancement, for a total state prison term of 50 years to life.

Defendant now contends on appeal as follows:

1. The trial court erred by failing to sua sponte instruct the jury on voluntary manslaughter based on a sudden quarrel or heat of passion, and he received ineffective assistance of counsel as a result of his counsel's failure to request an instruction on provocation to reduce the degree of murder.

2. The prosecutor committed a *Brady*² violation by failing to disclose a police report prior to trial.

¹ All further statutory references are to the Penal Code unless otherwise indicated.

² *Brady v. Maryland* (1963) 373 U.S. 83 (*Brady*).

3. An additional term of 25 years to life for the enhancement pursuant to section 12022.53, subdivision (d) violates the federal constitutional principles of double jeopardy.

We affirm the judgment in its entirety.

I

FACTUAL BACKGROUND

A. *People's Case-in-Chief*

On May 9, 2009, defendant's mother, Latricia "Trish" Woods, had a party at her apartment in the Terrace Village Apartments located in San Bernardino. Defendant lived with Trish. Abram Garnica and his sister Lydia also lived at the Terrace Village Apartments. On that day, they had heard the party at Trish's apartment, which lasted most of the day.

At around 11:00 p.m., Shawaynea Smith, Myiecha Anderson,³ Greg Carroll and Hubert Williams drove to Trish's party. They planned to drop Smith off at the party. Smith had dated Trish's husband in 2002, while Trish was in custody. Trish's daughter claimed that during this time Smith hit her.

Smith asked Williams, who was driving, to wait for her to see if she could get a ride home. Defendant, Danielle Benford and some other women were sitting in a car nearby in the parking lot. Benford offered to give Smith a ride home.

³ Anderson was Williams's fiancée.

Smith got in Benford's car. Trish approached the car where Smith was sitting with Benford and defendant. Smith and Trish began to argue. Trish told Smith I'm "going to whip your ass, bitch." Smith started to walk back to Williams's car; defendant and the others walked with Trish, who followed Smith. Trish tried to hit Smith and Smith tried to hit her back. Trish eventually hit Smith in the face.

Anderson got out of the car and helped Smith get back in Williams's car. They got back in the car but the windows were down. Trish stood by the passenger's side door and threatened Smith. Defendant and the other women were behind Trish yelling and screaming. Defendant said something to someone who was in the car.

At around 11:00 or 11:30 p.m., Abram and Lydia heard the commotion outside and saw two females fighting. One of them threw a boot at the other. The females were yelling profanity at each other.

Williams said to defendant, "Don't disrespect my girlfriend." Defendant told him it was a "family thing" and to stay out of it. Williams said "I got something for you." Williams got out of the car and slapped something that sounded like metal on top of the car.

Williams walked toward Trish, defendant and the other women. Williams had nothing in his hands. Defendant pulled a gun from his waistband and shot Williams three times in the chest. Lydia had gone inside to call the police about the fight. While inside, she heard three gunshots. Abram observed that Williams's hands were at his side and did not see a knife or anything in his hands when he was shot. Abram estimated they were about three feet apart when defendant shot Williams.

Abram went inside and grabbed the phone from Lydia. He told the 911 operator that the shooter was an African-American “kid” who was 18 or 19 years old. Abram said that the shooter lived in the complex. Abram told the operator he did not want to get involved. Abram told Lydia to hang up. Everyone ran from the scene. Anderson and Carroll put Williams in the car and drove him to the hospital.

A pool of blood was found in the carport area. Seven feet from the pool of blood, a knife was found. Nine-millimeter cartridge casings were also found. There was smeared blood on the knife which was consistent with the knife having been flat on the ground and the blood rolled under the knife. No one at the apartment complex would talk to police. An officer was finally able to contact Lydia. Abram was initially uncooperative but then admitted he had seen the shooting. He told the police that the shooter lived in apartment 137, Trish’s apartment.

No one was in Trish’s apartment and it was searched. A jar containing casings, a box of ammunition and a pile of clothing containing two live nine-millimeter rounds was found.

Abram told Lydia she should not testify and he did not want to testify. Abram purposefully chose someone else from the six-pack photographic lineup prior to trial so he would not have to testify. However, at trial, he was one-hundred percent sure defendant was the shooter. Lydia had seen defendant at the apartment complex but could not identify him as the male in the group just prior to the shooting. Lydia never saw anyone holding a knife.

One week after the incident, someone drove through the Terrace Village complex and told everyone that if they said anything about the shooting, there would be retaliation. Abram and Lydia were so scared they moved out of the state.

Prior to trial, Anderson identified defendant from a second six-pack photographic lineup that she was shown; she had been uncertain of her identification in a first lineup. She only testified defendant was in the crowd; she claimed that she never saw the shooter. Anderson did not identify defendant in court.

Smith initially told police she did not see the shooter's face. Later, in an interview, she described someone in the crowd as a "little short boy;" who she thought was Trish's son. At trial, Smith identified the shooter as defendant and that he was Trish's son. She lied to the police because she was scared. Defendant's family was a member of the Pimps, Players, Hustlers and Gangsters ("PPHG") gang. Smith had heard they were a violent gang and that they committed murders. Smith got rid of her cellular telephone because she had been receiving threatening phone calls since the shooting. Smith was being relocated after her testimony.

An autopsy on Williams revealed gunshot entry wounds on his left chest, left pelvis and right thigh. He had exit wounds on his right and left buttocks. No bullets were in his body. He died as a result of the gunshot wounds. The shooter was at least three feet away when he fired.

Defendant, who was 17 years old at the time of the shooting, surrendered to police on June 4, 2011.

San Bernardino Police Sergeant Travis Walker was an expert on criminal street gangs. He explained that criminal street gangs use intimidation to keep witnesses from reporting crimes. Witnesses who choose to testify could be subject to retaliation, including being murdered. PPHG was a criminal street gang that uses witness intimidation to keep witnesses from testifying in court against members of the gang.

B. *Defense*

Trish's daughter, Kayshiauna, lived in the apartment with Trish, defendant, and their sisters and brothers. Defendant only stayed in the apartment three days a week. Defendant was not at the party at the apartment on May 9.

Kayshiauna claimed that Smith punched Trish in the face. Trish punched Smith and pushed her back to her car. A man got out of the car and yelled, "I'm fixing to slide [n-word]s and bitches." Kayshiauna heard gunshots but did not see the shooter. It was not defendant. For the first time at trial, she said she saw two men standing nearby that she did not know. Defendant's other sister, Shakiba, also testified defendant was not at the apartment that night.

Smith had dated Kayshiauna's and Shakiba's dad while Trish was in jail. She had "whooped" Kayshiauna on the butt one time for spilling juice on Smith's carpet.

Defendant had been at the apartment the day before the shooting. On May 8, a probation officer had come to the apartment to conduct a probation search. Defendant jumped out a window and fled. Kayshiauna had not seen defendant since that day.

According to Benford, Smith got into her car and asked for a ride home. Trish and Smith then started arguing and Smith got out of the car. Smith punched Trish in the face and Trish punched her back. Smith yelled to the people she came with that she was being “jumped.” One of the women came and got Smith, and they got back in their car. The driver got out of the car and said he was going to start “knocking out” or “sliding” some “[n-word]s” and “bitches.” A man who was standing nearby, wearing a black sweater, fired a gun at the driver. Benford never saw defendant that night. Defendant’s family moved in with Benford after the shooting.

II

VOLUNTARY MANSLAUGHTER AND PROVOCATION INSTRUCTIONS

Defendant actually makes two claims of instructional error. First, he contends that the jury should have been instructed on heat of passion or sudden quarrel voluntary manslaughter. Second, he claims he received ineffective assistance of trial counsel due to his counsel’s failure to request an instruction on provocation (CALCRIM No. 522) to reduce the degree of murder.

A. *Additional Factual Background*

The parties agreed that self-defense instructions should be given. The jury was instructed that defendant was charged with murder and that manslaughter was a lesser offense of murder. They were then instructed on murder based on express and implied malice. They were instructed that in order to find defendant guilty of first degree murder, they had to find he committed the murder with premeditation and deliberation. The jury

was also instructed that defendant was not guilty if he acted in reasonable self-defense, and was guilty only of voluntary manslaughter if he acted in unreasonable self-defense.

The People argued in closing that defendant was the aggressor so he could not claim self-defense. He was yelling into the car and telling Williams it was a family matter. Further, defendant shot Williams from at least four feet away. Defendant's counsel argued exclusively that defendant was not present during the shooting.

B. *Analysis*

“In criminal cases, even absent a request, a trial court must instruct on the general principles of law relevant to the issues the evidence raises. [Citation.] “That obligation has been held to include giving instructions on lesser included offenses when the evidence raises a question as to whether all of the elements of the charged offense were present [citation], but not when there is no evidence that the offense was less than that charged. [Citations.]” [Citation.] “[T]he existence of “any evidence, no matter how weak” will not justify instructions on a lesser included offense, but such instructions are required whenever evidence that the defendant is guilty only of the lesser offense is “substantial enough to merit consideration” by the jury. [Citations.]’ [Citation.]” (*People v. Taylor* (2010) 48 Cal.4th 574, 623.)

“Voluntary manslaughter is a lesser included offense of murder. [Citation.]” (*People v. Booker* (2011) 51 Cal.4th 141, 181.) “Voluntary manslaughter is ‘the unlawful killing of a human being without malice’ ‘upon a sudden quarrel or heat of passion.’ [Citation.] An unlawful killing is voluntary manslaughter only ‘if the killer's reason was actually obscured as the result of a strong passion aroused by a “provocation”

sufficient to cause an “‘ordinary [person] of average disposition . . . to act rashly or without due deliberation and reflection, and from this passion rather than from judgment.’” [Citations.]’ [Citation.] ‘The provocation must be such that an average, sober person would be so inflamed that he or she would lose reason and judgment. Adequate provocation . . . must be affirmatively demonstrated.’ [Citation.]” (*People v. Thomas* (2012) 53 Cal.4th 771, 813.)

“[T]o justify the giving of voluntary manslaughter instructions it is not enough that there is *some* evidence of heat of passion. [Citation.] There must be ‘evidence *substantial* enough to merit consideration.’ [Citations.]” (*People v. Williams* (1995) 40 Cal.App.4th 446, 454.)

Here, there was no substantial evidence that Williams engaged in any provocation “sufficient to cause an ordinary [person] of average disposition . . . [to] be so inflamed that he or she would lose reason and judgment.” (*People v. Thomas, supra*, 53 Cal.4th at p. 813.) Williams exited the car and was overheard saying not to disrespect his girlfriend. Defendant responded that this was a family matter and that he should stay out of it. Williams then placed something on top of his car and said he had something for defendant. As Williams walked toward defendant, defendant immediately shot him three times.

The evidence establishes that defendant calmly shot at Williams. The brief exchange between defendant and Williams was not described as explosive or angry. No ordinary person of average disposition would shoot at another based on this brief exchange. This evidence supported the self defense instructions but there was not

substantial evidence of provocation to support the instruction. The trial court did not have a sua sponte duty to instruct the jury on heat of passion or sudden quarrel voluntary manslaughter.

Defendant also claims he received ineffective assistance of counsel due to his counsel's failure to request an instruction on provocation to reduce the degree of murder.

CALCRIM No. 522, as it relates to second degree murder, provides as follows: "Provocation may reduce a murder from first degree to second degree. . . . The weight and significance of the provocation, if any, are for you to decide. [¶] If you conclude that the defendant committed murder but was provoked, consider the provocation in deciding whether the crime was first or second degree murder." CALCRIM No. 522 is a "pinpoint" instruction and is only required to be given upon request of the defendant. (*People v. Hernandez* (2010) 183 Cal.App.4th 1327, 1333.)

Recognizing that his counsel did not request the instruction, defendant contends his counsel was ineffective for failing to request the instruction. To establish a denial of the right to effective assistance of counsel, a defendant must show (1) his counsel's performance was below an objective standard of reasonableness under prevailing professional norms, and (2) the deficient performance prejudiced the defendant. (*Strickland v. Washington* (1984) 466 U.S. 668, 687, 691-692; *People v. Ledesma* (1987) 43 Cal.3d 171, 217.) We will reverse on the ground of ineffective assistance of counsel "only if the record on appeal affirmatively discloses that counsel had no rational tactical purpose for his act or omission." (*People v. Zapien* (1993) 4 Cal.4th 929, 980.)

Provocation operates to make an intentional killing second degree murder by negating the premeditation and deliberation necessary for first degree murder. (*People v. Hernandez, supra*, 183 Cal.App.4th at p. 1332.) Provocation can be used to show the defendant “formed the intent to kill as a direct response to the provocation and . . . acted immediately.” (*People v. Wickersham* (1982) 32 Cal.3d 307, 329.) In other words, “provocation (the arousal of emotions) can give rise to a rash, impulsive decision, and this in turn shows no premeditation and deliberation.” (*People v. Hernandez, supra*, at p. 1334.)

The defense theory here was that defendant was not present at the time of the shooting. Moreover, the jury was instructed on self-defense. Either theory was based on defendant not having the intent to kill because either (1) he was not present; or (2) he deliberately shot at Williams to protect himself and/or the other people with him. Instructing the jury on provocation would have allowed the jury to find that defendant formed the intent to kill without premeditation and deliberation, which would have been inconsistent with the defense theories and would have undermined the attempt to secure an acquittal for defendant. The failure to request a provocation instruction could have been a deliberate and reasonable tactical choice by counsel. For this reason, defendant has not shown that the failure to request the instruction amounted to ineffective assistance of counsel.

Moreover, any “[e]rror in failing to instruct the jury on a lesser included offense is harmless when the jury necessarily decides the factual questions posed by the omitted instructions adversely to defendant under other properly given instructions. [Citation.]”

(*People v. Koontz* (2002) 27 Cal.4th 1041, 1085-1086.) The jury specifically found that defendant committed the murder of Williams with deliberation and premeditation. They were instructed that in order to find premeditation and deliberation that “[a] decision to kill made rashly, impulsively, or without careful consideration is not deliberate and premeditated.” “This state of mind, involving planning and deliberate action, is manifestly inconsistent with having acted under the heat of passion” (*People v. Wharton* (1991) 53 Cal.3d 522, 572.) Therefore, although the jury was not instructed on heat of passion necessary to reduce the murder to a voluntary manslaughter, defendant suffered no resulting prejudice based on the given instructions as a whole.

For the same reason, defendant’s ineffective assistance of counsel claim fails. The evidence of deliberation and premeditation was strong. After a brief exchange of words, Williams walked toward defendant with nothing in his hand. Defendant calmly pulled a gun from his waistband and shot Williams three times. The jury necessarily concluded that such killing was not done rashly or impulsively. Substantial evidence supported that defendant committed willful, premeditated and deliberate first degree murder and any lesser instructions would not have changed the verdict.

III

BRADY VIOLATION

Defendant argues that the prosecution committed misconduct by violating the duty articulated in *Brady* to disclose material evidence that is favorable to the defense.

A. Additional Factual Background

Defendant filed a new trial motion on the grounds that the People had violated *Brady* by failing to disclose an interview of Sandra Pliner, who was the manager of the Terrace Village Apartments in May 2009. According to a police report given to defendant's counsel at the time of sentencing, at the request of the deputy district attorney who tried the case, Pliner was interviewed on February 17, 2009, which was two years prior to the trial. She disclosed that the location of the knife was in a parking space that was assigned to Tracie Sterling. Sterling was not interviewed at that time.

Based on this information, a defense investigator interviewed Sterling on October 12, 2011. She denied that the knife belonged to her although she refused to sign a written declaration. Defendant's counsel argued that this evidence bolstered that the knife belonged to Williams and may have emphasized the self-defense claim instead of an alibi defense.

The People filed a response. The People argued this was not exculpatory evidence because Sterling did not witness the shooting, and had no knowledge of who possessed the knife during the shooting, or if at all. Moreover, the results of the trial would not have been different had the evidence been disclosed. Finally, defendant's counsel was given Pliner's name, the parking space number and a photograph of the crime scene prior

to trial. As such, defendant did not use reasonable diligence to locate the evidence.

Defendant's response reiterated that the self-defense claim would have been pursued had the evidence been disclosed.

The hearing on the new trial motion was conducted on December 16, 2011. The trial court noted that it had read the written motion, the opposition to the motion, and the reply to the motion.

The trial court ruled: "First, my first finding is I don't find any *Brady* violations. And in commenting on the strategy of defense counsel, in terms of arguments, there isn't a case that comes to trial where defense counsel doesn't - - has to make decisions on strategy. And it appears to me that evidence was available to both sides that would have led to this very limited area with respect to the knife and as it went, potentially, to self-defense. The evidence was all presented to the jury. The complaint basically is I didn't get to argue it. [¶] Argument isn't evidence and the evidence of the knife, the evidence of the actions of the decedent, and his attitude and his statements and the distance and the size, all of that was presented to the jury. They had it. The evidence was there. Whether counsel argued it or not, that's not evidence. And the standard seems to be a reasonable probability of a different result. I can't find there's a reasonable probability of a different result. [¶] And based on upon that, and looking at all the evidence, and having found that there's no *Brady* violation, the motion for new trial is denied."

B. *Analysis*

“In *Brady*, the United States Supreme Court held ‘that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.’ [Citation.] The high court has extended the prosecutor’s duty to encompass the disclosure of material evidence. . . .” (*People v. Hoyos* (2007) 41 Cal.4th 872, 917-918, overruled on another ground in *People v. McKinnon* (2011) 52 Cal.4th 610.) “Such evidence is material ‘only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.’ ‘A “reasonable probability” is a probability sufficient to undermine confidence in the outcome.’ [Citation.] “[T]he reviewing court may consider directly any adverse effect that the prosecutor’s failure to respond may have had on the preparation or presentation of the defendant’s case.” [Citations.]” (*Hoyos*, at p. 918.) A defendant has the burden of showing materiality. (*Ibid.*)

“There are three components of a true *Brady* violation: The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued.” (*Strickler v. Greene* (1999) 527 U.S. 263, 281-282.)

“On appeal, a trial court’s ruling on a motion for new trial is reviewed under a deferential abuse of discretion standard. [Citation.] Its ruling will not be disturbed unless defendant establishes “a ‘manifest and unmistakable abuse of discretion.’” [Citation.] Here, the asserted abuse of discretion is the asserted failure of the trial court to recognize

violations of defendant's constitutional rights. Our constitutional analysis below therefore also addresses the abuse of discretion issue." (*People v. Hoyos, supra*, 41 Cal.4th at p. 917, fn. 27.)

We need only address whether the evidence was favorable to defendant in resolving defendant's *Brady* claim (and need not determine if defendant exercised due diligence in obtaining the evidence or the People willfully withheld the evidence). Here, the evidence at trial established that Williams slapped something sounding like metal on the hood of his car. There was no dispute that Williams had nothing in his hand when he walked toward defendant.

The fact that a knife was found in a nearby parking space did nothing to bolster defendant's self-defense claim. No one saw a knife in anyone's hands that night. It was reasonable to presume it was on the ground prior to the fight. Even if it belonged to Williams, he did not have it in his hands when he approached defendant. The fact that the knife did not belong to Sterling would not have established that Williams possessed the knife, and threatened defendant to the point it justified him shooting Williams three times in the chest. The fact that the person who used the parking space where the knife was found did not own the knife had absolutely no impact on the evidence of self-defense. Since defendant cannot establish the evidence was material, he cannot prove a *Brady* violation. The trial court properly denied his motion for new trial.

IV

CONSECUTIVE SENTENCE FOR SECTION 12022.53, SUBDIVISION (D)

ENHANCEMENT

Defendant contends that the imposition of a section 12022.53, subdivision (d) firearms enhancement along with a sentence for first degree murder violates the federal constitutional principles of double jeopardy. Defendant was sentenced to 25 years to life for the first degree murder of Williams. In addition, the trial court imposed a consecutive, 25-years-to-life sentence on the section 12022.53, subdivision (d) conviction.

Section 12022.53, subdivision (d) provides a sentence enhancement when a person uses a firearm in the commission of a specified felony and proximately causes death. Murder is one of the listed felonies. Defendant argues that the double jeopardy protection against multiple punishments for the same act is violated when the enhancement is applied to murder cases because the act which causes death is used both as an element of the offense and an enhancement.

Defendant concedes, however, that our Supreme Court has recently rejected this argument and held that double-jeopardy principles are not applicable under the circumstances here, but defendant believes these cases were wrongly decided. (*People v. Izaguirre* (2007) 42 Cal.4th 126, 130-134; *People v. Sloan* (2007) 42 Cal.4th 110, 115-124.) We are, of course, bound by the decisions of our Supreme Court and we therefore must reject defendant's argument. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

V

DISPOSITION

The judgment is affirmed.

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RICHLI
J.

We concur:

RAMIREZ
P. J.

CODRINGTON
J.